The Other Agreement to Arbitrate a Labor Dispute

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I. INTRODUCTION

The "other" agreement authorizes an arbitrator to resolve an existing dispute, in contrast to the parties' collective bargaining agreement (CBA) which arbitrates generically described future disputes. A typical CBA promise to arbitrate future disputes might include a clause covering "all disputes concerning the interpretation or application of this agreement." A typical submission of an existing dispute authorizes the arbitrator to examine the grievant's discharge and decide whether the discharge violated a "just cause" limitation in the CBA.

The third of three 1960 United States Supreme Court cases, *United Steelworkers v. Enterprise Wheel & Car Corp.* (*Enterprise Wheel*)[1] reviewed a labor award and provides the doctrinal foundation for this Article. One aspect of the Court's holding reviewed the remedy contained in the award, which granted back pay to the grievants. The Court concluded that the award was within the arbitrator's authority, both on

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1. 363 U.S. 593 (1960). Three years earlier the Court discovered in the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. 185 (1982), judicial power to decree specific performance of CBA promises to arbitrate future disputes. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). In *Lincoln Mills*, the Court upheld the constitutionality of the statute as a grant of federal court jurisdiction regardless of diversity of the parties' state citizenship. The statute amounts to a Congressional grant of a charter of federal law to be judicially tailored as cases arise under the statute. For cases in federal court, the strictures of the Norris-La Guardia Act on labor injunctions do not apply to the kind of dispute (on arbitrability) presented in *Lincoln Mills*. *See* Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957). Professor Feinsinger was doubtful of the Court's reliance on legislative history in using it to support this type of labor injunction. In *Lincoln Mills*, the Court held that Congress rejected by implication "the common-law rule" referred to in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-21 (1924). Both common law and equity generally render compacts to arbitrate future disputes illusory. That non-statutory regime entitled either party to revoke at will a promise to arbitrate, and such freedom extended to promises to arbitrate an existing dispute. Until the award issued, a party could revoke and litigate, cutting off the arbitration. An award, however, could bind the parties. Burchell v. Marsh, 58 U.S. (17 How.) 344 (1854), demonstrates the finality of an award. The case arose on the "equity side" of the former federal circuit court. The bill to set aside the award succeeded, but the Supreme Court reversed. The submission underlying the award was commercial. It consisted of disputes about existing claims, demands, and other existing controversies. *Id.* at 346-47.

The Court found that the arbitrators had not exceeded the submission, and were not guilty of corruption, misbehavior, or, as charged in the bill, of ignorance, and that they had not made any mistake such as "would justify a court of chancery in annulling [the award]." *Id.* at 352.

that issue and on the Company's violation of the CBA.

This Article surveys cases reviewing awards for their congruence with what the parties authorized the arbitrator to decide, described as their "submission." The submission consists of a referral of an existing dispute as a matter of collective bargaining to obtain the arbitrator's award. Arbitration avoids resort to court or self help in resolving the dispute if negotiation fails to result in a settlement.

The Court in *Enterprise Wheel* concluded that the award was within the submission, and upheld the award with reference to the substantive terms of the CBA. The Court held that an arbitrator does not sit to dispense his/her own brand of industrial justice. The award must draw its essence from the substantive terms of the CBA. The award at issue met this "own-brand-essence" test.[2]

The two companion cases of the 1960 Trilogy, *United Steelworkers v. American Manufacturing Co.* (*American Manufacturing*)[3] and *United Steelworkers v. Warrior and Gulf Navigation Co.* (*Warrior and Gulf*)[4] provide guidelines for the exercise of courts' original jurisdiction in applying procedural terms of the CBA when resolving the threshold issue of arbitrability of the dispute. In each of these cases, the Union sued to compel the employer's participation in arbitration. The Union prevailed in both cases under the CBA arbitration clauses. In *AT&T Technologies, Inc. v. Communications Workers Local 5090* (*AT&T Technologies*)[5] the Court also decided that the dispute was arbitrable. By way of contrast, this Article begins with the Court's review of the

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2. 363 U.S. 593, 597 (1960). This test of the relationship between an award and the substantive terms was described as "a riddle enfolded in a paradox" after years of experience with it. Jones, *'His Own Brand of Industrial Justice': The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. REV. 881, 882 (1983). The instant enterprise could have been prompted by such a daunting reflection on the rhetoric of a passage in *Enterprise Wheel*, but was discovered after this Article began. Closer to the mark is an acute observation that the "own-brand-essence" test has "displaced all its rivals in the marketplace of judicial formulas." Ethyl Corp. v. United Steelworkers Local 7441, 768 F.2d 180, 184 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). Nevertheless, it is recognized that "[a]n arbitral award is also subject to judicial vacation for want of authority if it reaches beyond the boundaries of the 'submission,' the statement of the issue as agreed upon by the parties." St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1151 (1977). *See* Fairweather, *The Submission of a Case to Arbitration* in PRACTICE AND PROCEDURE IN LABOR ARBITRATION (2d ed. 1983); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 225-31 (4th ed. 1985).

3. 363 U.S. 564 (1960).

4. 363 U.S. 574 (1960).

5. 475 U.S. 643 (1986). This case emphasizes that when a court is asked to determine arbitrability of a grievance that issue is for judicial determination and the parties may not be ordered to arbitrate it, even if the court must decide whether an issue based on a substantive provision of the CBA is covered by the arbitration clause.

award under section 301 of the Labor Management Relations (Taft-Hartley) Act[6] (LMRA section 301) in *Enterprise Wheel.*

Careless usage of "arbitrability" generates confusion between issues for the arbitrator to decide and frustrates resolution of a dispute through an award. The award may address both single-issue and multi-issue disputes. For purposes of this Article, arbitrability as used here refers to whether the dispute is within the scope of the CBA agreement to arbitrate future disputes, but not to the issue or issues comprising the dispute.

The three preliminary sections that follow seek to examine (1) "procedural arbitrability" for its worth in assessing issues the submission includes, (2) submissions that include an issue based on a prior award, and (3) submissions of arbitrability to the arbitration process instead of resort to the courts to enforce the CBA agreement to arbitrate.

Cases from appellate courts and federal district courts for this study relate primarily to *Enterprise Wheel.* Most of the cases selected are not more than five years old. The principal passage from the *Enterprise Wheel* opinion (significant for the lower-court authorities discussed here) concludes that the Court "see[s] no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed in the areas marked out for his consideration. It is not apparent that he went beyond the submission."[7]

The Court uses "submission" in cases deciding both arbitrability and the finality of the award, rather than an award based on a bargained submission waiving arbitrability, *i.e.*, uncoerced by judicial decree. Subsequently, the Court reviewed such an award in *United Paperworkers International Union v. Misco, Inc.* (*Misco*)[8] and upheld it. The opinion of the Court relies on *Enterprise Wheel*[9] for the premise that the refusal of courts to review the merits of an arbitration award is the proper approach.[10]

II. PROCEDURAL ARBITRABILITY

Arbitrability is used as a term for the issue whether the parties have agreed to settle a current dispute by arbitration. "Procedural arbitrability" refers to issues arising during the pre-arbitral grievance procedures before the dispute itself becomes arbitrable. *John Wiley & Sons, Inc.*

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6. 29 U.S.C. 185 (1982).
7. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).
8. 108 S. Ct. 364 (1988).
9. *Id.* at 370.
10. *Id. Misco*'s confirmation of the award, based on the parties' voluntary submission, yields its primary significance for this Article in supplementing *Enterprise Wheel*, where the submission was judicially decreed.

v. Livingston,[11] the first case discussing procedural arbitrability in the United States Supreme Court, furnishes an example. The CBA at issue prescribed three successive "Steps" for grievance settlement by negotiation between the parties prior to resort to arbitration, but neither party had invoked these stages. The Court concluded that the dispute was arbitrable, and held that " 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."[12] They are not conditions precedent to arbitrability, as the Company argued in seeking a judicial determination that the dispute was not arbitrable, but are initially for the arbitrator. The Court reasoned: "It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other."[13] *John Wiley* assimilated (1) the issues arising from CBA grievance procedures prior to arbitration with (2) the merits of a dispute under the substantive terms of the CBA, in the event of an arbitrable dispute (3) under the CBA procedural undertaking to arbitrate. Only the third issue, arbitrability of the dispute, is resolved through judicial determination.

The opinion of the Court in *Misco* refers to *John Wiley's* teaching as "our observation" that when the dispute is arbitrable, procedural issues growing from the dispute and bearing on its resolution are for the arbitrator.[14] For this and for other reasons,[15] the Court concludes that any assumed error of the arbitrator in excluding evidence from consideration does not justify vacating the award. The Court's thus tentatively formed category, procedural issues within a voluntary submission to arbitration, addresses the arbitrator's refusal to consider evidence and quoted his objection: that the company could not discharge the grievant "and then spend eight months digging up supporting evidence to justify" the discipline imposed.[16]

Two cases preceding *Misco* had, in reviewing awards based on voluntary submissions, vacated awards based on procedural issues. In one case the award sustained a grievance protesting unjust suspension and discharge without cause.[17] The award was based on the Union's contention that the Company's disclosure of its intention to discharge the grievant before he was suspended violated the CBA requirement of five days'

11. 376 U.S. 543 (1964).
12. *Id.* at 557.
13. *Id.*
14. United Paperworkers Int'l Union v. Misco, Inc., 108 S.Ct. 364, 372 (1988). Blackmun, J., concurring, joined by Brennan, J., approved the Court's opinion (adding commentary only on what it did not decide) without specific reference to *John Wiley*. *Id.* at 375.
15. *See infra* text accompanying note 16.

suspension prior to discharge. The dissenting opinion defended the award; the arbitrator's "determination of procedural fairness is sufficiently integral to 'just cause' to sustain" the decision.[18] The other case also involved a just-cause grievance against discharge. This case involved two five-day limits under the CBA, one within which the Union was to raise the grievance with the supervisor of the grievant, and the other within which the parties were to confer after the Union's complaint was answered.[19] The arbitrator did not reach the merits, concerning a nurse's discharge for an accumulation of dosage mistakes in following physicians' prescriptions, but granted an award upholding the grievance because the Company defaulted on the second limit for a Company-Union conference. The Union's prior default in bringing the complaint to the supervisor's attention (based on her testimony) moved the court to remand to another arbitrator for resolution on the merits.[20]

Misco's "observation" from *John Wiley* has a guarded quality in that the Court's opinion flanked that reference on one side with a passage approving the arbitrator's assertion that his refusal to consider after-acquired evidence was consistent with the practice of other arbitrators. On the other side the Court stated that it is "worth noting" that the award "did not forever foreclose" the Company from using the evidence

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16. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372 (1988). The Tenth Circuit Court of Appeals decided against a grievant seeking judicial relief without prior arbitration. The CBA provided for a hearing on such grievances within ten days after a grievance had been delivered to the Company. The parties had defaulted in giving the grievant a hearing, so the grievant in suing relied on CBA provisions that in default of the hearing the case was "forfeited" and "deemed closed." Whether there was an issue of the Union's fair representation does not appear, but in any event the Court concluded that the grievant-plaintiff's case presented an arbitrable issue. Denhardt v. Trailways, Inc., 767 F.2d 687 (10th Cir. 1985). This holding added a qualification not addressed in *John Wiley*: the CBA language lacked "positive assurance" that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. *Id.* at 689. *Accord* Nursing Home Union v. Sky Vue Terrace, Inc., 759 F.2d 1094 (3d Cir. 1985).

The court directly ordered arbitration when the company refused to arbitrate on the ground that the Union defaulted on the CBA requirement to notify the company of the exact nature of the grievance. The order was based on another CBA provision that if arbitrability is questioned, the determination of the question is for the arbitrator in the first instance, and on *John Wiley*. United Food & Commercial Workers Locals 770, 889, 1442 v. Lucky Stores, Inc., 806 F.2d 1385 (9th Cir. 1986). In another arbitrability case, the court invoked *John Wiley* and affirmed the lower court's order requiring arbitration. The court relied on the CBA provision for arbitration of arbitrability as including issues of timeliness in the procedure prior to arbitration. Oil, Chem. & Atomic Workers Local 4-447 v. Chevron Chem. Co., 125 L.R.R.M. (BNA) 2232 (5th Cir. 1987).

17. Johnston Boiler Co. v. International Bhd. of Boilermakers Local 893, 753 F.2d 40 (6th Cir. 1985).

18. *Id.* at 43. In Shopmen's Local 539 v. Mosher Steel Co., 796 F.2d 1361 (11th Cir. 1986), the Union requested arbitration after the CBA time limit expired, but the Company waited until the first day of the hearing to object. The arbitrator rendered an award on the merits after deciding for the Union on waiver. The court upheld the award on the ground that the timeliness issue was one for the arbitrator.

as the basis for discharge.[21] These cautionary signals could have been linked to an explicit comparison between what the Court referred to as "evidentiary matters"[22] and issues (as in *John Wiley* and *Flair Builders*) related to promptness in grievance negotiations prior to the arbitration itself. Since the Court's opinion in *Misco* did not draw such a distinction, it seems impetuous to take the case as authoritatively including procedural issues relating to the conduct of the arbitration hearing as specimens of "procedural arbitrability." If so, questions remain concerning the scope of judicial review of an award rendered on procedural issues, as compared with the bargaining freedom the parties enjoy under *American Manufacturing, Warrior and Gulf*, and *AT&T Technologies* with regard to substantive issues. A case resembling *Flair Builders* resulted in remand for further arbitration, when the Union had delayed for over three years in submitting the dispute. The award granted back pay to each grievant measured by half-an-hour a day for a three year period. The arbitrator noted that the parties' relationship appeared amicable because they had not been strictly observing procedures, but the Court's remand was for a determination of what was a reasonable time for the Union to have gone forward.[23]

Misco has opened a Pandora's Box of determining whether the procedural-arbitrability concept extends to procedural issues arising during the arbitration hearing. The Court has yet to undertake clarification of that concept as it relates to judicial review of awards. Given such a CBA provision imposing time limits on steps in negotiating a grievance, may the parties effect by their submission the preservation of a timeliness-waiver issue (for example, reservation of a wider judicial review than the "own-brand-essence" test)? If no such CBA provision exists, consider the alternatives for the parties in negotiating the submission when the CBA provides that the substantive issue or issues are arbitrable.

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19. Asociacion de Senoras Damas v. Unidad Laboral de Enfermeras y Empleados de la Salud, 126 L.R.R.M. (BNA) 3357 (D.P.R. 1987).

20. The court employed the "own-brand-essence" test in that the arbitrator ignored the supervisor's testimony and indulged in an unbalanced application of the similar five-day provisions. In *Johnston Boiler*, the court also used the "own-brand-essence" test, rather than the dissenter's characterization of the issue as procedural. Johnston Boiler Co. v. International Bhd. of Boilermakers Local 893, 753 F.2d 40, 43 (6th Cir. 1985).

21. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372 (1988). In *Johnston Boiler*, the court did not respond to the dissenting opinion. It appears that the issue for the court was not one of "procedural arbitrability."

22. But nothing in *Misco* suggests that the parties may not preserve (by apt CBA language or reservations in the submission) issues of procedural arbitrability for judicial review of the award. The Court's opinion is at pains, insofar as hearing procedures are concerned, to refer to a CBA provision that prohibited the arbitrator from considering hearsay evidence and to conclude that "evidentiary matters were otherwise left to the arbitrator" by section VI of the CBA. *Id.* at 371.

23. Pinkerton's NY Racing Sec. Serv., Inc. v. Service Employees Local 32E, 805 F.2d 470 (2d Cir. 1986).

III. A FORMER AWARD

Suppose that the parties, pursuant to a decree compelling submission of a grievance dispute, take issue before the arbitrator on the effect of a prior award between the same parties under the same CBA. In *W.R. Grace & Co. v. Rubber Workers Local 759*[24] the Court addressed the effect of a prior award and concluded that only the subsequent award was subject to judicial review. That award, of arbitrator B, was contrary to arbitrator A's award.

The former award (by arbitrator A) was the result of a back-pay grievance,[25] which the arbitrator denied. The Union did not contest the award. Subsequently, arbitrator B heard another of the back-pay grievances similar to the first award, but this time sustained it. Arbitrator B concluded that arbitrator A's award did not draw its essence from the CBA. The Court sustained the award, testing it on several grounds, including the "own-brand-essence" test. The critical significance of *W.R. Grace* lies in its affirmance of the court of appeal's decision to sustain the subsequent award,[26] while explicitly rejecting the prior-award law of the court of appeals. The Court reviewed the subsequent award while declining to review the former award, whereas the court of appeals considered it essential to review the former award and vacate it for the subsequent award to stand.[27]

W.R. Grace is part of the Court's interpretation of LMRA section 301 holding that when the parties agree to arbitrate a labor dispute arising under a CBA, issues within that dispute belong initially to arbitration rather than litigation. In *W.R. Grace* the Court for the first

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24. 461 U.S. 757 (1983).

25. Arbitration was compelled. Southbridge Plastics Div. v. Rubber Workers Local 759, 565 F.2d 913 (5th Cir. 1978). The Company reinstated grievants in compliance with the court's decision, but the back-pay grievance went to arbitration. The first one to reach arbitration is the subject of arbitrator A's award.

26. W.R. Grace & Co. v. Rubber Workers Local 759, 652 F.2d 1248 (5th Cir. 1981), *aff'd*, 461 U.S. 757 (1983).

27. The Court stated that the court of appeals was correct in enforcing the subsequent award, "although it seems to have taken a somewhat circuitous route to this result." W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 764-65 (1983). Its initial premise that the validity of the former award was relevant evoked the Court's disagreement. "Only the enforceability of the [subsequent] award is at issue." *Id.* at 765 n.7. Judge Williams, writing for the panel, subsequently observed that the Court "took the easy way out." Judge Williams expressed the view that if the award is based upon the "'essence of the contract' and interprets and applies a provision of that contract, [the award] is and should be binding on the parties for the duration of that contract." Williams, *Arbitration in Court: Judging the Judges*, in PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 21, 28 (W. Gershenfeld ed. 1986).

time supplemented the *Enterprise Wheel* holding on scope of judicial review of an award.[28]

Lower courts' decisions in consonance with *W.R. Grace* include *IBEW Local 199 v. United Telephone Co.*[29] When the Union won an award through arbitration, that award suited it so well it sued for declaratory judgment that the award be "binding precedent" for future arbitrations. The Union lost. The court's opinion aptly summarizes the law of *W.R. Grace* "[T]he federal policy of judicial non-interference [with] and preservation of the dignity of the arbitral process requires that the development and imposition of a binding 'law of the contract' be achieved by the arbitral system itself. . . ."[30]

An intriguing issue of "grooming" regulation joins on-the-job tonsorial care of facial hair to care off-duty and off-premises. The Union's National Agreement with the Company in section 144 required employees to "comply with the *reasonable* standards of personal regulations issued by the Company," a CBA provision reviewed in *Trailways Lines v. Trailways Joint Council.*[31] The submission stipulated that the arbitrator (M) was to decide whether the Company violated the CBA when it required two grievants, mechanics employed "in the St. Louis garage, to shave off their beards [and] [i]f so, what should be the remedy?"[32] M found violations in that the requirement was unreasonable. The award required the Company to cease enforcing its policy as a no-beard requirement of employees at garage facilities, but the Company has a right to require their beards to be neat and well trimmed.

At the arbitration hearing the Company introduced an award rendered three months earlier by arbitrator L. That award denied the grievance; the no-beards rule was not unreasonable.[33] The court affirmed the district

28. *Misco* supplemented *W.R. Grace*, which addressed a public policy issue, collateral to the integrity of the award under the submission (which was compelled by judicial decree). The justices in *Misco* agreed that they had granted certiorari to resolve a division among the courts on when to set awards aside as contravening public policy. Justices Blackmun and Brennan, however, wrote that the opinion of the Court did not reach that issue. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 375 (1988). Counsellors will probably consult both *Misco* and *W.R. Grace* on the cloud of public policy, seeing that both upheld an award if found otherwise binding as a matter of collective bargaining. Contrast Black v. Cutter Laboratories, 351 U.S. 292 (1956), dismissing the writ to a state court because no substantial federal question was presented. The decision of the state supreme court involved only the state's construction of a local contract under local law. The just-cause issue on the grievant's discharge under the contract between the parties "cannot be construed, and will not be enforced, to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise." *Id.* at 299, *quoting* Black v. Cutter Laboratories, 43 Cal. 2d 788, 809, 278 P.2d 905, 916 (1955). *But see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

29. 738 F.2d 1564 (11th Cir. 1984).

30. *Id.* at 1571.

31. 807 F.2d 1416, 1417 (8th Cir. 1986), *reh'g denied, en banc*, 817 F.2d 1333 (1987).

32. *Id.* at 1418.

33. *Id.*

court order, and vacated M's award under the "own-brand-essence" test.[34] The court of appeals identified arbitrator M's analysis as "in large part a verbatim copy" from M's 1981 award in another matter.[35] On the petition for rehearing en banc, the dissenting opinion expounded the view that both L's and M's awards drew their essence from the CBA. The opinion dissented from denial of the petition for rehearing and distinguishes between the issue of violation and that of remedy and disagrees with the court in avoiding the question whether M exceeded his authority in addressing the grooming policy of the Company across the board to employees at garage facilities (rather than the two grievants). The opinion concludes, with the district court, that the submission authorized only a remedy necessary to resolve the grievance of the two employees.[36]

United Paperworkers Union Local 1206 v. Georgia Pacific Corp.[37] held that an award sustaining grievances of three stock preparation helpers did not bind the Company with respect to subsequently-filed grievances of thirty other stock preparation helpers. As to the three beneficiaries of the award, the arbitrator found the Company in violation of the CBA in depriving them of the opportunity to work twenty-eight hours overtime by assigning the work to laborers. While the Company paid the award, the Union filed suit on behalf of the thirty grievants arguing that the Company's use of laborers instead of giving overtime opportunity to the thirty grievants was a wilful refusal to carry out the award. The court held that the courts should abstain from anticipating the arbitrator's decision on prospective effect of an award unless it appears that "the current conduct inarguably falls"[38] within the award. The court contrasted the twenty-eight-hour award to three grievants with the "current conduct" of the Company towards the other numerous grievants.

In *Mine Workers District 12 UMW v. Peabody Coal Co.*[39] the court phrased its formula for reserving the question of an award's prospective

34. Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 624 F. Supp. 880, 885 (E.D. Mo. 1985), *aff'd*, 807 F.2d 1416 (8th Cir. 1986). The district court also concluded that M exceeded the submission in that his award contained an unwarranted remedy. The sole issue limited the remedy "to what the arbitrator reasonably believed would restore the *grievants* to the position they would have been in but for the employer's breach of contract." *Id.*

35. Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 807 F.2d 1416, 1422 (8th Cir. 1986).

36. Judge Heaney, joined by Judges Lay, McMillan, and Arnold, dissented. Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 817 F.2d 1333 (8th Cir. 1987).

37. 798 F.2d 172 (6th Cir. 1986).

38. *Id.* at 173-74.

39. 602 F. Supp. 240 (S.D. Ill. 1985).

effect to arbitration in terms of "positive assurance."[40] This means the award was intended to cover the present dispute, rather than whether the current conduct inarguably falls within the award. In 1974, the arbitrator's award agreed with the Company's right to abolish the exclusively first shift job of belt repair persons, but decided that the Company could not assign the displaced grievants to rotating shifts. Almost nine years later, the Union sued the Company for violating the award when assignments were made to rotating shifts. The court refers to three intervening CBA's implemented since the award, and notes variations that include the addition of provisions related to work-force re-alignments. Under these circumstances the court disagreed with the Union, holding that its case did not meet the "positive assurance" criterion.

When an arbitrator hears a former-award issue within a submission compelled by judicial decree, *W.R. Grace* holds that the arbitrator has authority to determine the effect of the former award. A court may review only the subsequent award. The lower court cases reviewed here extend this holding to former awards based on the parties' bargained submission. The cases are consistent with *W.R. Grace* in limiting judicial review of an award when the union seeks to enforce it, and the prospective effect of the award is at issue.

This discussion of procedural arbitrability and former awards constitutes a background for close examination of the effects of the submission on judicial review of the award.

W.R. Grace appears to channel the issue of a former award to an initial determination by arbitration, although the *Trailways* holding demonstrates that within the own-brand-essence test of the subsequent award, the court may, as the dissenting opinion points out, prefer the result of the former award.[41]

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40. The court adopted this language from a case prior to *W.R. Grace*, in United Mine Workers Dist. 5 v. Consolidated Coal Co., 666 F.2d 806, 811 (3d Cir. 1981). The court rejected "strict [material] factual identity" from Oil Workers Local 4-1600 v. Ethyl Corp., 644 F.2d 1044 (5th Cir. 1981). The opinion discusses but does not embrace the position that mere disagreement between the parties suffices to leave the dispute for arbitration. Mine Workers Dist. 12 UMW v. Peabody Coal Co., 602 F. Supp. 240, 242 (S.D. Ill. 1985) (quoting Little Six Corp. v. UMW Local 8332, 701 F.2d 26, 29 (4th Cir. 1983) and *citing* Boston Shipping Ass'n v. International Longshoremen, 659 F.2d 1 (1st Cir. 1981)).

41. Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 817 F.2d 1333, 1337 (8th Cir. 1987).

IV. SUBMISSION OF SUBSTANTIVE ARBITRABILITY

"Substantive arbitrability" describes whether the CBA requires an existing dispute to be resolved by arbitration.[42] As shown above, *John Wiley* and *Flair Builders* distinguish between issues of procedural arbitrability and the arbitrability of the dispute. Those cases denied a party immediate access to court (under *Warrior* and *Gulf*) to litigate procedural arbitrability, when the dispute itself was arbitrable. An issue of procedural arbitrability, if the dispute is judicially determined to be arbitrable, comes within the arbitrator's authority, at least initially, similar to the effect of a former award.

Only *Misco*, *W.R. Grace*, and *Enterprise Wheel* furnish precedent for judicial review of awards under LMRA section 301, and only *Misco* reviews an award from a submission that is itself the product of bargaining on arbitrability of the dispute. The parties may submit substantive arbitrability in addition to the merits if the arbitrator finds the dispute arbitrable. The party contending that the dispute is not arbitrable (usually the employer) may prefer arbitration of that issue over litigation, hoping for a decision that the dispute is not arbitrable, or at least a favorable award on the merits.

Local 369 Utility Workers v. Boston Edison Co.[43] presents a different pattern: the parties limited their submission to whether the dispute was arbitrable. The submission was phrased: "Does the issue raised by P&M Grievance No. 2089 dated November 14, 1979 present an arbitral difference between the parties under the collective bargaining agreement?"[44] This constituted the entirety of the submission. The grievance at issue complained of the denial of benefits under the parties' Industrial Accident Benefit Plan when the grievant was laid off due to a reduction of the work force.

The CBA provided that officers of the Company, the Medical Director and the Vice President in Charge of Employee Relations, would decide all issues arising under the Plan, including questions of total and partial incapacity for work. The CBA provided that their decisions were final.

Under the CBA, a Board of Arbitration heard all grievance disputes, and its awards were final (bringing them within LMRA section 301 finality as *Enterprise Wheel* defined it). Paralleling *Enterprise Wheel*, the CBA also provided an exception to finality in that the Board had

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42. The CBA itself may require initial submission to arbitrate substantive arbitrability. United Food & Commercial Workers Locals 770, 889, 1442 v. Lucky Stores, Inc., 806 F.2d 1385 (9th Cir. 1986).

43. 752 F.2d 1 (1st Cir. 1984).

44. Utility Workers Local 369 v. Boston Edison Co., 588 F. Supp. 800, 804 (D. Mass.), *aff'd*, 752 F.2d 1 (1st Cir. 1984).

no power to add to, subtract from, or modify any terms of the CBA. The CBA extended the Board's jurisdiction to cover grievance disputes, defined as any dispute concerning the true interpretation and meaning of the CBA terms, or rates of pay or other conditions of employment not settled by the CBA.

Thus, the CBA covered finality of decisions under the Plan along with finality of arbitral awards. The Plan administrators terminated the grievant's benefits when he was laid off. Should the Board attend to the meaning of a provision in the Plan requiring cessation of benefits when the beneficiary retires or is otherwise terminated?

In this final-final opposition, the Board's award attributed finality to the Company's termination of benefits: the dispute was not arbitrable.

The court dove between the finality horns (Plan administrators' decisions and CBA awards) and concluded that the award of non-arbitrability did not draw its essence from the CBA.[45] The court viewed the Plan's procedure, investing Company with authority officials to terminate benefits, as subordinate to the finality of the Board's awards on the merits. The Board abdicated its function to hear and decide grievance disputes. The court reasoned that the Plan's procedure cannot be read as including the discretion to determine all CBA standards and rules for the entire class of Plan beneficiaries. The court contrasted that discretion with the administrators' resolution of disputed facts bearing upon an individual claim to benefits. Furthermore, the arbitration clause of the CBA does not exclude the administrators' determinations from the grievance disputes subject to the Board's authority. The CBA clause refers to "any dispute . . . concerning the true interpretation and meaning of this Agreement. . . ."[46] "Any dispute" includes the substantive provision of the Plan that required cessation of benefits when the beneficiary's employment is "terminated." Upholding the award "leaves no room for any sensible theory of judicial review";[47] such a result thrusts jurisdiction on the court either to adjudicate the meaning of "terminated" de novo, and accord finality to the administrators' decision, or to engage in some deferential scope of review. The court characterizes de novo review as "completely anomalous; just because deference had been accorded the arbitrator's [the Board's] award, no deference at all would . . . be accorded a decision-maker more subordinate than the arbitrator."[48] The court further explained that some deferential scope of review of the administrators' decision by the court would be inconsistent with the role of courts in reviewing awards, drawing courts into

45. Utility Workers Local 369 v. Boston Edison Co., 752 F.2d 1, 2 (1st Cir. 1984).
46. *Id.*
47. *Id.* at 4.
48. *Id.*

an area of expertise conferred by the parties on their chosen arbitrators instead of referring their disputes to litigation.

The court's no-essence conclusion on the invalidity of the award advanced its review into the subject of this Article. The parties' submission did not include the merits of the dispute. However, the court remanded the matter to the Board for a consideration of the merits, or the meaning of the substantive CBA provision for cessation of Plan benefits when the employment of the beneficiary was terminated. The court reserves the amount of deference owed to the administrators' decision to the arbitrator. This method of resolving arbitrability by judicial decree in the form of remand is tangent to a bargained submission, and suggests a supplement to *Warrior and Gulf* and other Supreme Court interpretations of the arbitrability doctrine.

Boston Edison serves to introduce other lower court cases on arbitrability, but none of them review an award resting on a submission of arbitrability alone (without reference to the merits). The cases that follow demonstrate that a party may reserve the issue of arbitrability while conditionally submitting the merits.[49] However, the holdings differ on how to accomplish this reservation.

Avis Rent A Car System v. Garage Employees Local 272[50] holds that a clearly lodged objection to the other party's procedures in choosing an arbitrator preserves the objection for future judicial determination. The court further held that the party's objection is not waived by participating in the hearing before the arbitrator is selected by virtue of the other party's selection procedures. In *International Association of Heat and Frost Insulators Local 34 v. General Pipe Covering, Inc.*,[51] another case concerning arbitrator selection, the CBA provided: "Any controversy which cannot be settled informally by the Trade Board parties shall be referred to a neutral arbitrator chosen by mutual agreement of the parties."[52] The Trade Board rendered an award contested by the Union. The Union urged that the dispute should have continued on to a neutral arbitrator because the Trade Board (composed of three representatives of each of the parties) failed to settle the dispute. The court rejected the Union's interpretation of "the Trade Board parties." They are not the parties before the Board, but its members.

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49. *See supra* note 40 and accompanying text.

50. 791 F.2d 22 (2d Cir. 1986). *Cf.* Supermarkets General Corp. v. United Food & Commercial Workers Local 919, 645 F. Supp. 831 (D. Conn. 1986)(award by arbitrator chosen through AAA procedures confirmed, as against party contesting the award, whose request for selection through state agency was untimely).

51. 792 F.2d 96 (8th Cir. 1986).

52. *Id.* at 99.

The six members were authorized to make their award.[53]

A party contesting an award on judicial review may learn that the arbitrability issue was raised too late. In *Jones Dairy Farm v. United Food & Commercial Workers Local P-1236,*[54] the parties agreed upon the choice of an arbitrator, and went forward at the hearing on a grievance claiming the Company had contracted out some janitorial work previously done by bargain-unit members. The submission included the following CBA provision:

> "With respect to the subcontracting of work, and the performance of work at this plant rather than elsewhere, each party retains its legal rights as in effect prior to execution of this Agreement, and nothing in the Agreement shall be construed as adding to or subtracting from those rights."[55]

The award sustained the grievance. In the view of the arbitrator, the Company's subcontracting lacked protection under the CBA reservation of its legal rights. The court upheld the award, holding that when a party goes forward with a submission under a CBA substantive provision containing a "legal rights" qualification, that party has consented to arbitration of the legal rights issue, absent a timely objection to the arbitrator's authority.

Another court's elaboration under LMRA section 301 on the reservation of arbitrability for judicial review is *Dreis & Krump Manufacturers International Association v. Machinists District 8.*[56] The statute, according to the court, provides that a suit seeking to set aside an award is a suit for breach of contract, *i.e.*, the arbitration clause of the CBA. But the opinion in *Dreis* continues with attention to the submission. Should the CBA clause on management rights have been so broad as to have made nonarbitrable a decision to subcontract work, the Company had two options: (1) refuse to arbitrate or, (2) submit the dispute to arbitration "under protest."[57] The Company failed to take either option and therefore lost the arbitrability issue.

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53. *Id.* at 99-100. The members of the Board did not deadlock. When a National Arbitration Committee deadlocked 3-3 on three discharge grievances, and the CBA provided for the dispute in such event to be referred to an impartial arbitrator, the court ordered that the dispute be referred to the arbitrator for resolution. International Union of Elevator Constructors v. National Elevator Indus., 772 F.2d 10 (2d Cir. 1985).

54. 760 F.2d 173 (7th Cir.), *cert. denied,* 474 U.S. 845 (1985).

55. *Id.* at 174. The opinion refers to the law of the Seventh Circuit and of the NLRB. The NLRB had repudiated its *Milwaukee Spring Div. I* decision, 265 N.L.R.B. 206 (1982), in *Milwaukee Spring Div. II,* 268 N.L.R.B. 601 (1984), arriving at a position favorable to employers in a case related to subcontracting. But neither failure of the arbitrator to predict the NLRB's change of heart or the arbitrator's refusal to be bound by Seventh Circuit precedent moved the court to set aside the award. Jones Dairy Farm v. United Food & Commercial Workers Local P-1236, 760 F.2d 173, 177 (7th Cir. 1985).

56. 802 F.2d 247 (7th Cir. 1986).

57. *Id.* at 252.

Teamsters Local 764 v. J.H. Merritt & Co.,[58] a much-cited case, reviewed a submission based on a grievant's discharge on September 16, 1983, when no CBA was in existence. The parties concluded an agreement the following month.[59] The CBA contained an arbitration procedure and, substantively, a limitation against discharge without just cause. The procedure provided for a Joint Arbitration Board as arbitrator. The Board sustained the grievance and awarded reinstatement with back pay after hearing the merits. On judicial review, the Company argued for the first time that the dispute resolved by the award was not arbitrable. The court sustained the award but rejected the Company's argument as failing either on a theory of waiver or implied submission of arbitrability.

In *Jones Dairy Farm*, *Dreis*, and *J.H. Merritt* the parties' submission rendered the award valid as against attack on judicial review based on non-arbitrability. Those submissions were bargained, not judicially determined. Similarly, in *Knollwood Cemetary v. United Steelworkers*,[60] the parties' submission was not coerced by a decree, but it had been subjected to a compulsion differing from a judicial order to arbitrate. The Company responded to the Union's demand for arbitration arguing that, as in *J.H. Merritt*, there was no CBA provision for arbitration. The Union then filed charges with the NLRB, and thereafter the parties entered into an agreement to settle by submitting the dispute to arbitration. That agreement was effective, in the court's opinion upholding the award, in that the arbitrator's recognition that the dispute was arbitrable had a rational basis in the submission.

The focus of this Article on bargained submission rather than judicial review of an award through comparison with prior CBA's yields the preceding cases that exclude a courtroom attack on the award as exceeding arbitrability, unless reserved timely in the arbitration. That principle emerges as LMRA section 301 law under those cases examining the submission. *J.H. Merritt* and *Knollwood* focus critical emphasis on the submission in that the employer in both cases belatedly raised the issue of arbitrability.

Two cases discussing the failure to maintain an objection to arbitra-

58. 770 F.2d 40 (3d Cir. 1985).

59. The parties agreed to settle the strike through an oral agreement. Disputes concerning reinstatement of strikers ensued. The parties then entered into a written submission. This "subsequent CBA" bound the panel of arbitrators so designated to the memorandum if a majority found that "any or all of the Employers party to this Memorandum of Agreement did agree" to a strike settlement. The submission also specified that the panel would have "no equitable or interest authority or jurisdiction. Its sole authority and jurisdiction is specifically set forth in this Memorandum." Local Joint Board of Las Vegas Local 226 v. Riverboat Casino, Inc., 817 F.2d 524, 526 (9th Cir. 1987).

60. 789 F.2d 367 (6th Cir. 1986).

bility before the arbitrator are *George Day Construction Co. v. United Brotherhood Carpenters Local 354*[61] and *Orange Belt Dist. Council of Painters v. Kashak.*[62] Both holdings instruct the party challenging the award on judicial review how to persuade the arbitrator to find against arbitrability and, failing that, how to preserve the issue of arbitrability for judicial review in the event the award on the merits goes against the party.

In *George Day*, the parties at the hearing argued the question of arbitrability along with the merits. In reviewing the award's basis both on arbitrability and the merits, the court refused to reconsider arbitrability and upheld the award on the merits. The court judged from the Company's conduct in arguing arbitrability at the arbitration hearing that "it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability."[63] In *Kashak*, the employer's objection to arbitrability at the hearing was phrased as reserving "all [the employer's] rights to object to the arbitration based upon any defenses [the employer] might have to the collective bargaining agreement itself."[64] The court held that the objection would not effect reservation of the arbitrability issue for judicial review.

Little significance should be attributed to the incoherence of the just-quoted "reservation." At the beginning of the hearing, the arbitrator must take the initiative, if necessary, to clarify whether the parties agree that the dispute is arbitrable. If they do not, two principal questions require prompt resolution: Is the party opposing arbitration seeking to be heard on that issue? If so, does that party reserve judicial review of the arbitrator's decision if the arbitrator should find the dispute arbitrable? Clarification of these questions requires early attention for another reason, *i.e.*, whether two hearings are necessary. If the parties seek to be heard on the merits, and should the arbitrator find the dispute arbitrable, the arbitrator must attend to scheduling. The arbitrator may have to decide, if the parties disagree, whether to schedule a hearing on arbitrability first, and a later hearing on the merits if the dispute is held arbitrable.

This discussion of cases in lower courts reviewing awards on bargained submissions including the merits provides a transition. It concludes the preliminary topics on issues for arbitration within arbitrable disputes,

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61. 722 F.2d 1471 (9th Cir. 1984).
62. 774 F.2d 985 (9th Cir. 1985).
63. George Day Constr. Co. v. United Bhd. Carpenters Local 354, 722 F.2d 1471, 1475 (9th Cir. 1984).
64. Orange Belt Dist. Council of Painters v. Kashak, 774 F.2d 985, 989 (9th Cir. 1985).

procedural arbitrability and former awards. The transition moves towards the focus of the article: judicial review of awards on bargained submissions (excluding arbitrability). The remaining topics deal with modes of submission, discharge grievances, awards denying damages for breach of a no-strike provision in the CBA, job security cases, and incomplete awards.

V. MODES OF SUBMISSION

A hearing should begin with a clean slate for the arbitrator. Any ex parte approaches to the arbitrator prior to the hearing should be promptly disclosed. If the arbitrator finds that they were of such gravity as in themselves to be disqualifying, the disclosure will account to the parties for further declining to serve.

The parties and the arbitrator must concentrate on the reason for the hearing, or what the parties agree to submit. Frequently the parties will not have anticipated this need with the same level of intensity as that encountered in preparation for litigation. This informality is one of arbitration's attractions.

Instances of judicial review of awards about modes of submission of the dispute to the arbitrator include two cases in which the CBA provided the method of submitting the dispute. The following discussion further examines the effects of the mode of submission on judicial review of the awards.

When the parties formally agree upon the submission and provide the arbitrator with a document purportedly embodying their agreement, judicial review of the award appears to resemble, in considerable degree, litigation interpreting a written contract. The following is an example of a CBA provision foreshadowing the beginning of the arbitration hearing: "At the commencement of the arbitration hearing, the parties shall submit in writing the question or questions to be decided by the arbitrator. . . ."[65] There the court attending to such a requirement concluded: "Although the submission agreement was not reduced to writing, the transcript shows that counsel for the employer, [and] counsel for the Union, with the arbitrator's approval, agreed upon a submission agreement."[66] Hence, the court found the arbitrator did not disregard the CBA. But in *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Local 6*,[67] the court affirmed the partial vacation of an award because it violated the CBA provision that "[t]he Arbitrator may consider and decide only the particular issue or issues presented by the

65. Hilton Int'l Co. v. Union de Trabajadores de la Industria Gastronomico Local 610, 600 F. Supp. 1446, 1450 (D.P.R. 1985).

66. *Id.*

67. 715 F.2d 405 (8th Cir. 1983).

grievance or by the parties submitted to him in writing and only issues relating to the interpretation and/or application of the agreement."[68] This language limits the arbitrator's authority in two directions: (1) from the submission and, (2) from the CBA. The court, however, does not indicate whether the submission consisted of the grievance (against discharge) or was based on written issues as stated by the parties. The case was decided on the "own-brand-essence" branch of *Enterprise Wheel.*[69]

It is customary to refer to a formal submission as the parties' "stipulation." The parties, however, may authorize the arbitrator to formulate the submission.[70] The court in *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Truck Drivers Local 1*[71] described the submission as the equivalent of legal pleadings, joining the issues and empowering the arbitrator to decide them. Many hearings proceed on an oral agreement submitting a grievance. The grievance, in turn, may refer to the CBA, either generally or by reference to its specific provisions. In the absence of a prior CBA provision for arbitrating future disputes, the submission of a current dispute becomes in itself the basis for an award.[72]

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68. *Id.* at 407.

69. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). The holding is therefore beyond the scope of this Article. The CBA provided that an employee violating its prohibition of work stoppages would be subject to discharge and "shall have no recourse to any other provisions of this Agreement except as to the fact of participation." St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6, 715 F.2d 405, 408 (8th Cir. 1983). The arbitrator's authority was exhausted when he found the grievant guilty of an unauthorized work stoppage, and the award was properly vacated insofar as it mitigated the discharge by reinstatement and partial back pay. *Cf. supra* notes 2 & 5.

70. "Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 765 (1983). The context of this quotation makes it clear that the Court is not referring to the submission, but to the arbitrator's authority to resolve an arbitrable dispute by reference to the substantive terms of the CBA. *See* S. KAGEL, ANATOMY OF A LABOR ARBITRATION 171-74 (2d ed. 1986), for a sample submission and persuasive arguments with suggestions about other modes of submission. *Id.* at 73-79, 127-28, 135-36. *See also* M. GROSSMAN, THE QUESTION OF ARBITRABILITY: CHALLENGES TO THE ARBITRATOR'S JURISDICTION AND AUTHORITY 49-50 (1984), for a discussion of disagreement between the parties on the submission. In a court-ordered arbitration case, the court formulated the submission but allowed the arbitrator to decide whether to permit amendment of the issues. New York Tel. Co. v. Telephone Traffic Union, 126 L.R.R.M. (BNA) 2086 (W.D.N.Y. 1987).

71. 611 F.2d 580 (5th Cir. 1980).

72. Cases reviewing awards based on submission of disputes by "subsequent CBAs" include Teamsters Local 764 v. J.H. Merritt & Co., 770 F.2d 40 (3d Cir. 1985), and Local Joint Executive Board of Las Vegas 226 v. Riverboat Casino, 817 F.2d 524 (9th Cir. 1987).

VI. DISCHARGE GRIEVANCES

The grievance in *Piggly Wiggly* disputed the discharge of a driver. At the hearing, the Company contended that the grievant became uninsurable and was discharged under a CBA provision requiring insurance. The Union argued that the CBA contained no such requirement. The arbitrator examined negotiations leading to a CBA draft signed by the parties and concluded that no agreement was reached on the insurance condition. This conclusion was one ground for the award, which sustained the grievance. Although there was no separate contract of submission, the court upheld the award on the theory that the parties presented the entire grievance and thereby empowered the arbitrator "to decide the issues stated in the grievance."[73]

In *Lackawanna Leather Co. v. United Food & Commercial Workers District 271*,[74] the court, upholding the award, held that an arbitrator does not exceed the scope of the submission as long as the decision stays "within the areas marked out for his consideration."[75] The CBA provided for discharge of an employee who, within a year, received three written notices for various derelictions, including inefficiency and absenteeism. The third notice charged the employee with poor performance in operating a hide-shaving machine, and was accompanied by a discharge notice which recounted the two prior notices. The grievance claimed that the Company discharged the grievant for refusing to take vacation time during a plant shutdown rather than draw unemployment compensation. The grievance protested that the third warning notice and discharge were "not for justifiable cause as per the labor agreement."[76] The arbitrator gave the three-notices provision a narrow reading, viewing the notices as cumulative rather than the Company's combination of the third notice with the other two different infractions. The arbitrator found that the third notice was justified, but the award ordered reinstatement.

A three-judge dissent argued for remand to arbitration for consideration of an exhibit that tended to support the Company's combination of the three notices on the basis of past practice. This dissent denounced

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73. Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Truck Drivers Local 1, 611 F.2d 580, 584 (5th Cir. 1980). In Sheet Metal Contractors Ass'n v. Sheet Metal Workers Local 17, 619 F. Supp. 1073 (D. Mass. 1985), the Arbitration Board was held to have exceeded its authority in reaching the issue of the validity of the CBA because the parties agreed that the issue had not been part of the grievance nor had it been discussed at the hearing. *See also* Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986); Champion Int'l Corp. v. United Paperworkers Int'l Local 37, 779 F.2d 328 (6th Cir. 1985).

74. 706 F.2d 228 (8th Cir. 1983).

75. *Id.* at 235 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

76. *Id.* at 231.

the arbitrator's work as a "clear deprivation of industrial due process."[77] One of the three dissenters wrote separately, asserting that the arbitrator had sandbagged the Company, having "*sub silentio* sprung his own interpretation on this non-issue in the award without an iota of evidence in the record to support it, all in apparent direct conflict with past company practices as recognized by all the parties."[78]

The court's opinion states that the parties had adduced no evidence concerning the meaning of the three-notices provision of the CBA, but, in effect, arbitrators need not foresee an issue first broached upon judicial review of the award.[79] The basis of the submission in *Lackawanna* was the grievance, even if review of the award did not reach the grievant's theory of reprisal by the Company for refusal to take vacation time. Consequently, the judgment upholding the award on the basis of the submission by grievance should be considered consistent with the finality postulate in *Enterprise Wheel.*

The parties may expand the issues beyond those raised by the grievance. In *International Chemical Workers Local 566 v. Mobay Chemical Corp.*,[80] the grievance was based on a discharge for failing to qualify for a skilled job on three occasions. The parties arbitrated their further agreement to include specifications the Company filed against the grievant five months after her discharge detailing her unsatisfactory work record. The arbitrator ruled against the Company because the CBA did not authorize discharge for three disqualifications in seeking a skilled job. Nevertheless, the award denied reinstatement because of the unsatisfactory work record and granted back pay up to the date the specifications concerning her work record were filed. Quoting from *Enterprise Wheel*,[81] the court enforced the award, holding that an award should be enforced when it is not apparent that the arbitrator exceeded the submission.

Butterkrust Bakeries v. Bakery Confectionery & Tobacco Workers Local 361[82] vacated reinstatement of a discharged grievant, holding that an arbitrator "can bind the parties only on issues that they have agreed

77. *Id.* at 235 (J. Gibson, concurring in part and dissenting in part).

78. *Id.*

79. *Compare* Sheet Metal Contractors Ass'n v. Sheet Metal Workers Local 17, 619 F. Supp. 1073 (D. Mass. 1985), *supra* note 73.

80. 755 F.2d 1107 (4th Cir. 1985).

81. *Id.* at 1112 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)). Another court following *Mobay* held that an intent to arbitrate an issue may be implied from the parties' conduct. It was nevertheless undisputed that the arbitrator was aware of the expiration date (May 18, 1985) and of the date the Union was decertified (May 15, 1985). The Court vacated reinstatement and back pay in part (from the period following the expiration of the CBA). Hospital Employees Local 1273 v. Deaton Hosp., 125 L.R.R.M. (BNA) 2964 (D. Md. 1986).

82. 726 F.2d 698 (11th Cir. 1984).

to submit to him."[83] The evidence showed that the grievant uttered belittling remarks to two sanitation employees and slapped the hand of one of them. One victim then punched the grievant in the face, whereupon the grievant reached for his pocket, saying: "I'll cut your guts out."[84] Bystanders showed the grievant from the room before any further violence ensued. The arbitrator considered the grievant's prior history with the Company, which showed a series of disciplinary sanctions for disturbances in the plant. According to the court's opinion, the arbitrator found just cause for discharge, although not on the basis of the latest episode alone.[85] The court found it proper for the arbitrator to have considered the grievant's disciplinary history. However, the award granted reinstatement on condition that the grievant successfully complete a Dale Carnegie course. Citing *Piggly Wiggly*,[86] the court concluded that the award exceeded the sole issue submitted, *i.e.*, whether there was just cause for grievant's discharge.[87]

The dissenting opinion contended that the issues submitted related only to grievant's latest misconduct, and the application of Company rules against fighting and using provocative and abusive language.[88] The dissent would find accordingly that the arbitrator exceeded the submission, but only after finding lack of just cause for discharge in the grievant's behavior. Although the arbitrator could have found just cause,

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83. *Id.* at 700 (quoting Piggly Wiggly Operator's Warehouse, Inc. v. Piggly Wiggly Truck Drivers Local 1, 611 F.2d 580, 583 (5th Cir. 1980)). The opinion described the submission as variously worded, but it is clear at least that the grievance was based on discharge.

84. Butterkrust Bakeries v. Bakery Conf. & Tobacco Workers Local 361, 726 F.2d 698, 699 n.2 (11th Cir. 1984).

85. *Id.* at 699.

86. Piggly Wiggly Operator's Warehouse, Inc. v. Piggly Wiggly Truck Drivers Local 1, 611 F.2d 580, 583 (5th Cir. 1980). *See supra* text accompanying notes 6-7. *See also* Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), *cited in* Butterkrust Bakeries v. Bakery Conf. & Tobacco Workers Local 361, 726 F.2d 698, 700 (11th Cir. 1984), *supra* note 83, adopting as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

87. The court also vacated the award under the "own-brand-essence" test, in that the CBA "reposed sole control over employee discipline in Butterkrust and expressly prohibited modification of its terms, . . . [so when] the arbitrator found the prerequisite for discharge to be present, his authority over the matter ceased." Butterkrust Bakeries v. Bakery Conf. & Tobacco Workers Local 361, 726 F.2d 698, 700 (11th Cir. 1984). The court relied on cases from the Fourth and Sixth Circuits, rather than United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), but the award's mitigation of discipline provides a plausible occasion for vacating the award under the CBA.

88. Butterkrust Bakeries v. Bakery Conf. & Tobacco Workers Local 361, 726 F.2d 698, 701 (11th Cir. 1984). This opinion appraises the submission from the language of the termination notice and the Company's statement of the issue in the arbitration hearing, in addition to the grievance.

on his finding to the contrary "that should have been the end of his decision."[89]

It is puzzling that the *Butterkrust* court found anything in *Piggly Wiggly* on which to rely. The court in *Piggly Wiggly* was clear that the contents of the grievance constituted the submission, and no interpretation or application of the CBA was at issue, thus eliminating the "own-brand-essence" test of *Enterprise Wheel*. In *Butterkrust*, the judges disagreed on a "variously worded" form of the submission. Although they agreed that the award's "Carnegie course" element exceeded the scope of the submission, they otherwise disagreed on the outer limits of the submission.

Butterkrust poses a challenge to arbitrators to ascertain what the parties are submitting, and to define the limits of discretion to provide an award. Under LMRA section 301, the parties expect a final award consistent with the submission. The arbitrator has an obligation to the parties to define the scope of the submission, if possible at the beginning of the hearing. Ambiguity about the submission confuses the hearing in that both the parties and the arbitrator are left at sea on offers of evidence, since each such offer may require a ruling on the scope of the submission. This piece-meal progress toward defining the submission could, in most instances, have been precluded earlier in the hearing. The parties' definition of what they want the arbitrator to decide should be clear before the parties call witnesses. In *Butterkrust*, for example, it does not appear that the arbitrator attempted to find out what belonged to the submission, whether in accord with the dissenter's definition of it as confined to grievant's belligerence on one occasion, or the court's approval of the arbitrator's consideration of grievant's prior disruptions. It was incumbent on the arbitrator to decide that issue, providing the parties with the opportunity for judicial review.

Evidence related to the grievant's mental health engaged the arbitrator's attention on the just cause issue, when the grievant had been discharged for insubordination (shouting obscenities at his supervisor). The court upheld the arbitrator's finding that the shouting was insubordinate conduct, but vacated the award as incomplete for lack of a finding on just cause for discharge. The award had directed the parties to select a psychiatrist whose opinion would determine the outcome (subject to the arbitrator's authority for sixty days after the psychiatrist's report). If the report showed that the grievant had been mentally ill and would not recover sufficiently to perform the underground work to

89. *Id.* The imposition of a Dale Carnegie course was beyond the arbitrator's authority, but since the grievant did not raise it, this defect is unimportant at the court of appeals stage.

which he had been assigned, the discharge would be sustained. If the grievant recovered, he would be reinstated with seniority, but without backpay. The court remanded for the arbitrator to devise a different procedure, leaving with the arbitrator the responsibility for determining the just-cause issue. On remand, the arbitrator would give careful attention to the weight, relevance, and authenticity of mental-health evidence. The parties could each produce evidence or agree on a single examination of the grievant.[90] *Enterprise Wheel* distinguishes between grievance and remedy in its emphasis upon the arbitrator's discretion in framing the remedy, even in the face of a CBA provision on remedy. Contrast this submission: "Did the Company have just and sufficient cause for the discharge... [of the grievant], and, if not, what is the appropriate remedy?" The court in *Hacienda Hotel v. Culinary Workers Local 814*[91] honored the submission in this language as having included both issues — justifiable cause for discharge and the arbitrator's ability to devise a remedy. The grievant was discharged for falsifying her timecards and shouting obscenities at the chief engineer. She fraudently obtained $1500, using some of it to repay loans from her supervisor. The supervisor was in collusion with the grievant, and forfeited an annual bonus. The arbitrator concluded that the sanctions should have been more equitable and awarded reinstatement and back pay. The court concluded that even if the arbitrator's concern with disparate treatment was erroneous, the parties were bound by their submission of the issue of just cause.

The foregoing cases constitute a gloss on *Enterprise Wheel* insofar as it reviewed an award of reinstatement and partial back pay.[92] *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Truck Drivers*

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90. Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289 (9th Cir 1987). *See infra* text accompanying note 159 for a discussion of a procedure that failed abysmally.

91. 175 Cal. App. 3d 1127, 1130, 223 Cal. Rptr. 305, 306 (2d Dist. 1985). Similarly, in Hilton Int'l Co. v. Union de Trabajadores de la Industria Gastronomica Local 610, 600 F. Supp. 1446, 1450 n.9 (D.P.R. 1985), the court upheld the award under the submission holding that the parties agreed for the arbitrator to "determine, in accordance to law, and the evidence presented, if the dismissal of [the grievant] was justified or not; and if not, that the Arbiter provide the adequate remedy." *Id. See supra* text accompanying note 1.

92. The CBA there provided:

> Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 594 (1960).

Local 1[93] sustained the award's remedy of reinstatement and back pay as well as its upholding the grievance, due to the absence of cause for discharge under the CBA. Although *Enterprise Wheel* referred to a remedial provision in the CBA, the *Piggly Wiggly* court was satisfied with the parties' submission on the basis of the grievance. The court held that the "initial contract to arbitrate may be modified by the submission agreement or grievance."[94] Similarly, in *Lackawanna Leather Co. v. United Food & Commercial Workers District 271*,[95] the parties' submission on the grievance was adequate to support the award on both lack of justifiable cause and the remedy. The submission in *Hacienda Hotel v. Culinary Workers Local 814*[96] expressly authorized the remedy if the arbitrator found lack of just and sufficient cause for discharge; and in *Hilton International Co. v. Union de Trabajadores de la Industria Gastronomica Local 610*,[97] the submission similarly authorized the arbitrator to provide the adequate remedy if the dismissal of the grievant was unjustified.

In contrast to these four cases, *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Local 6*[98] concluded that the remedial part of the award exceeded the arbitrator's authority. Unlike *Piggly Wiggly*, which put aside the CBA provisions because the grievance—the exclusive basis of the parties' submission—included the remedy issue, the parties in *St. Louis Theatrical* had elaborated their CBA agreement providing further provisions of a procedural nature. The parties were bound thereby not to make a submission that would modify the CBA. The CBA arbitral procedures in *St. Louis Theatrical* required the submission to include only issues relating to the CBA.[99] Thus, it precluded the arbitrator's consideration of remedy, and limited the issue to whether the grievant had participated in a "work stoppage." The "essence-own-brand" test of *Enterprise Wheel* applies to review of the award on the substantive terms of the CBA; and yet, in *St. Louis Theatrical*, that test compared the submission with the CBA's procedures for arbitration. How far *Piggly Wiggly* extends in review of awards that modify the CBA by virtue of the submission awaits further litigation on the finality of the CBA.

Other cases vacating an award of reinstatement after discharge are not readily distinguishable from *Enterprise Wheel*, which condoned an arbitrator's discretion to "bring his informed judgment" especially "when

93. 611 F.2d 580 (5th Cir. 1980).
94. *Id.* at 584.
95. 706 F.2d 228 (8th Cir. 1983). *See supra* note 16 and accompanying text.
96. 175 Cal. App. 3d 1127, 223 Cal. Rptr. 305 (2d Dist. 1985).
97. 600 F. Supp. 1446 (D.P.R. 1985).
98. 715 F.2d 405 (8th Cir. 1983).
99. *See supra* text accompanying notes 3-5.

it comes to formulating remedies."[100] The Court, although starting with a CBA remedy of reinstatement and "full compensation at the employee's regular rate of pay for the time lost,"[101] nevertheless observed that the drafters of the CBA may never have thought of "what specific remedy should be awarded to meet a specific situation."[102]

The lower courts' gloss is consistent with *Enterprise Wheel.* The arbitrator should timely explore any constraints contained in the submission in considering an award diminishing the Company's discretion to discharge an employee; the union may be pressing for reinstatement and otherwise complete restoration of benefits, or, in the alternative, for some lesser modification of the Company's penalty.[103]

Enterprise Wheel warrants remand for further arbitration based on ambiguity of a back pay award.[104] In *Communications Workers v. Radio Station WUFO,*[105] the court reviewed the arbitrator's formulation of the submission: "Did the Company violate [the CBA] by discharging [the grievant] without cause? If so, the Union seeks reinstatement with back pay and benefits as the remedy." This method of describing the submission properly belongs in the opinion leading to the award.[106] The court found the award failed to clarify whether "cause" for discharge occurred, when awarding reinstatement and back pay as from thirty days after grievant's discharge. The court considered the arbitrator's conclusion that the grievant was not guilty of "gross insubordination," but found that he had not determined whether mere insubordination would constitute cause for discharge under the CBA. Thus, the court implied that the award should have dismissed the grievance instead of mitigating the discharge to thirty days' suspension without pay.

When an arbitrator finds just cause for discharge, the remedy portion in the submission loses its force. The award in *Pacific Crown Distibutors v. Teamsters Local 70*[107] included back pay from the date of discharge

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100. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

101. *Id.* at 594.

102. *Id.* at 597.

103. The foregoing cases include two awards upheld on judicial review granting remedies diluting the Company's discipline. At one extreme, the award in Lackawanna Leather Co. v. Food Workers Dist. 271, 706 F.2d 228 (8th Cir. 1983), granted reinstatement and back pay, upholding only the third disciplinary notice. The other award granted partial back pay only, but otherwise upheld the discharge. International Chem. Workers Local 566 v. Mobay Chem. Corp., 755 F.2d 1107 (4th Cir. 1985).

104. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

105. 122 L.R.R.M. (BNA) 2465 (W.D.N.Y. 1986).

106. *Id.* at 2466. The arbitrator's formulation of the submission, when the parties have not provided a clear text of their agreement, may recite the submitted grievance, referring to CBA provisions if any are invoked in the grievance. It is not uncommon that the parties will defer attention to the submission until the arbitrator has heard their opening statements.

107. 183 Cal. App. 3d 1138, 228 Cal. Rptr. 645 (1st Dist. 1986).

to the date of the award even though the discharge was upheld. The award found that the Company violated the CBA in relieving the grievant from duty on the date of discharge instead of waiting for it to be upheld under the grievance procedure. Since the Union raised this contention for the first time in its post-hearing brief, the court vacated the award, holding that a union cannot force modification of a submission on an unconsenting employer. The court also rejected the Union's contention that *John Wiley* grants the court the discretion on review of an issue of procedural arbitrability to uphold the award.[108]

In *Pacific Crown*, the court relied on *Food Workers Local 274 v. Clougherty Packing Co.*[109] In *Food Workers*, the hearing began with a quite detailed submission of several issues, but did not include a state law issue. The arbitrator was persuaded that the state statute governed instead of the CBA provision about loss of seniority after a specified period of disability. Consequently, the award granted the grievant the relief sought. The court upheld the award on the ground that the Company allowed the additional issue to become part of the submission.

The converse situation went to arbitration in *Television and Radio Artists, Cleveland Local v. Storer Broadcasting Co.*,[110] in which the Union sought discharge of an employee for not being a member of the Union even though assigned to bargaining unit duties as an "assignment editor." The award sustained the grievance, ordering that the employee be given the opportunity to join the Union or be discharged. The CBA provided for a union shop, except "supervisors as defined in the NLRA as amended."[111] When the Union sued to enforce the award, the district court remanded for arbitration of the employee's supervisory status in acting as assignment editor. After the arbitrator found assignment editors not to be supervisors, the district court disagreed and vacated the award. The court of appeals sustained the award except in its remedy, which the court re-formulated. The Union was not entitled to have the employee discharged, but if the employee failed to join the Union, he must be removed as assignment editor. The opinion otherwise upheld the award, quoting from *W.R. Grace & Co. v. Rubber Workers Local 759*,[112] and found the district judge in error for second-guessing the arbitrator's interpretation of "supervisor." The parties bargained for that interpretation, which involved a mixed question of fact and law, and except

108. *See supra* text accompanying notes 18-22.
109. 154 Cal. App. 3d 282, 201 Cal. Rptr. 183 (2d Dist. 1984).
110. 745 F.2d 392 (6th Cir. 1984).
111. *Id.* at 395.
112. "Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a

for the remedial component of the award the arbitrator "was doing exactly what the parties agreed he should do."[113]

The reviewing court typically compares a submission connecting the dispute with a substantive provision in the CBA requiring the Company to have cause for discharge. If a violation is found, the parties will also have submitted the remedy issue, whether the grievant should be reinstated with back pay. In *Communications Workers v. Radio Station WUFO*,[114] the court remanded for a clarification of an award of reinstatement and back pay. The court considered the conclusion that the grievant was not guilty of "gross insubordination" as short of determining whether mere insubordination would constitute cause under the CBA. The arbitrator's clarification on remand persuaded the court to uphold the award as based on lack of cause for discharge.[115]

The court's remand may depend upon evidence transpiring after the award. In *Oil, Chemical, and Atomic Workers Local 4-228 v. Union Oil Co. of California*,[116] the award granted the grievant reinstatement in 1985 on the basis of the arbitrator's estimate that her drug habit constituted a low risk of future indulgence, but subsequent positive tests led the court to remand on the question whether her reinstatement "could have carried the portent for damages to herself, her fellow workers, or the refinery."[117]

In *Misco*,[118] the grievant was discharged for violation of Company Rule II.1 which prohibits bringing controlled substances onto plant premises. Its violation is cause for discharge. After the parties submitted

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question of contract interpretation that the parties have delegated to the arbitrator." *Id.* at 398 (quoting W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 765 (1983)). *See supra* note 70. In *W.R. Grace*, the submission was by court decree, not voluntary agreement. That is, the Court was not pronouncing on the *Piggly Wiggly* observation that subsequent collective bargaining in the submission may modify the CBA arbitration clause. *See* Piggly Wiggly Operator's Warehouse, Inc. v. Piggly Wiggly Truck Drivers Local 1, 611 F.2d 580, 584 (1st Cir. 1980). *Compare* from Johnston Boiler Co. v. International Bhd. of Boilermakers Local 893, 753 F.2d 40, 43 (6th Cir. 1985) ("But we do hold that the presumption of authority that attaches to an arbitrator's award applies with equal force to his decision that his award is within the submission.").

113. Television & Radio Artists, Cleveland Local v. Storer Broadcasting Co., 745 F.2d 392, 400 (6th Cir. 1984).

114. 126 L.R.R.M. (BNA) 2240 (W.D.N.Y. 1987).

115. Despite the latitude of discretion afforded an arbitrator's consideration of remedies upholding a discharge grievance under *Enterprise Wheel*, the opinion leading to the award requires explicit analysis of the submission with respect to the underlying issue of whether the grievance is to be sustained as well as the basis for the remedy. In such a disposition, special care is needed in fashioning an award that will not require further arbitration on remand.

116. 818 F.2d 437 (5th Cir. 1987).

117. *Id.* at 443.

118. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1988).

their dispute on the grievance, the award granted the prayer for relief that the grievant be reinstated with backpay and full seniority. The parties had stipulated the issue as whether the Company had "just cause to discharge the grievant under Rule II.1" and "[i]f not, what if any should be the remedy."[119]

The award found that the Company did not have just cause. The arbitrator, in discussing that issue, invoked seven criteria, among which he took into account only the information given the Company up to the time of the discharge. In particular, as the Company asserted in discharging the grievant, he was found in a car on the premises of the Company under circumstances violating the Rule prohibiting possessing drugs on plant premises. Those circumstances were that the grievant was apprehended in the back seat of the car with marijuana smoke in the air and a lighted marijuana cigarette in the front-seat ashtray.

The District Court vacated the award. The Court of Appeals affirmed, concluding that the arbitrator had ample proof that the Rule was violated. The Court, however, reversed, upholding the award. Its unanimous opinion (on the Rule violation) expounds two perspectives: that the mere claim of improvident, even silly, fact-finding will not suffice to disregard the arbitrator's determination of what happened;[120] and that even if the reviewing court can disagree on the factual basis in favor of cause for discharge the arbitrator normally has authority to disagree with the sanction imposed by the employer.[121]

VII. Damages for Breach of No-Strike Clause

A Company grievance seeking damages for breach of the CBA no-strike clause went to arbitration in *Daniel Construction Co. v. Operating Engineers Local 513*.[122] When members of the back-fill crew arrived at the construction site, they were ordered to depart immediately. All the operating engineers except two left their jobs. After four shifts had refused to work, the Union agreed to send representatives to persuade the next shift to stay on the job. The parties agreed in submitting the issue of what items of damages the Company was entitled to by law

119. *Id.* at 368.

120. *Id.* at 371.

121. The Court's opinion quotes from *Enterprise Wheel*, 363 U.S. 593, 597, concerning the remedial discretion of the arbitrator. The Court also describes the proper course for courts to follow before vacating on just cause would be remand for the arbitrator to make a definitive construction of the contract. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372-73. The Court thus supplements *Enterprise Wheel* in relation to remand, on violation as well as remedy, but the Court has already upheld the award on the just-cause issue.

122. 738 F.2d 296 (8th Cir. 1984).

and whether the Union was entitled to assert a defense under the collateral source rule, relating to the Company's cost-plus contract with the owner. The CBA contained no remedial provision for violation of its no-strike clause. The court upheld the award which rejected some of the damage claims as too speculative and otherwise denied the grievance. The Company failed to show that it had strike-related costs beyond those for which it had realized reimbursement from the owner. When a party agrees to be bound by the award, it is final if the arbitrator "stays within the areas marked out for his consideration."[123]

VIII. JOB SECURITY

Court-reviewed awards have involved loss of job security, whether from displacement by machinery or from other causes. One aspect of this subject involves how the parties have agreed to accept loss of workplaces and the use of collectively bargained systems of seniority governing which workers would be laid off.

The Court in *Humphrey v. Moore*[124] sanctioned the combination of two seniority lists by dovetailing into one. The "arbitrator" was a Joint Committee composed of an equal number of representatives of the union and the employers of two bargaining units. The system was based upon a multi-employer system from which disputes arising between the union and a member employer would go to the Joint Committee unless settled at the local level.

Two CBA's, between the same local union and two haulers of automobiles were alike in both their agreement to arbitration and in requiring submission to the grievance procedure of controversies generated by the employer's absorption of the business of another carrier. The employers, E&L and Dealers Transport, were haulers from the Louisville, Kentucky assembly plant of the Ford Motor Co. When Ford informed them that there was, as the result of declining business, room for only one of them in the Louisville operation, the haulers agreed to a multi-location plan by which Dealers Transport would absorb E&L's work from Louisville. On recommendation of the local union and in reliance upon a provision of the Dealers Transport CBA, the Joint Committee awarded dovetailing at Dealers Transport (in Louisville) the seniority of E & L drivers with the seniority of Dealers drivers.

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123. *Id.* at 301 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)). The reciprocal set of union grievances about reinstatement of strikers [&] Joint Executive Board of Las Vegas Local 226 v. Riverboat Casino, 817 F.2d 524 (9th Cir. 1987), went to arbitration under a submission excluding the panel from exercising equitable authority. The court held (on the issue of whether a strike settlement agreement existed) that acceptance of an offer by silence is not exclusively an equitable principle.

124. 375 U.S. 335 (1964).

The Court found the award final and binding. First, the record lacked adequate support for the plaintiff's attack on the integrity of the Union and the procedures which led to the award. Second, the absorption provision of the CBA reasonably meant that it was applicable to this dispute, because there was an absorption and that provision did deal with both jobs[125] and seniority. Although the seniority of most of the E & L drivers was greater than that of the Dealers Transport drivers, the Joint Committee's "decision to integrate lists upon the basis of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here."[126]

In *Griesmann v. Chemical Leaman Tank Lines, Inc.*,[127] the parties bargained under two CBA's, one for the cement drivers and the other for the liquid ("tank") drivers. The cement drivers worked from a cement terminal in Stockertown and at a Nazareth terminal. In 1982, hauling of both cement and liquid began at Nazareth with respective seniority lists for either type of work. That combination resulted upon closing the Stockertown (cement) terminal and the Company's including the Stockertown cement drivers in the Nazareth seniority list.

Liquid drivers (at Nazareth) enjoyed a practice that seems to have been uncontroverted: if liquid hauling was slack, they could be dispatched for "overflow" work needed for cement hauling after all seniority-list cement haulers had been dispatched (and similarly on liquid hauling for cement drivers, on "overflow" existing after exhaustion of the liquid drivers list).

The liquid drivers' grievance against the melding of Stockertown cement drivers with Nazareth cement drivers in 1982 rested on a provision in the 1977 agreement that the Company would add no more drivers to the cement list. The arbitrator dismissed grievances filed by eight liquid drivers. The arbitrator received two documents: a Company notice on May 20, 1977, reciting the agreement of the parties that Nazareth cement drivers could transfer to the bottom of the liquid list, but had to do so by May 31, 1977, at 8:00 a.m., after which "no additional drivers would be added to the cement list"; and a letter of the same tenor issuing from negotiations that preceded the notice. Thus, the eight grievants relied upon those documents as foreclosing the Company's asserted duty in 1982 to meld the Stockertown cement

125. Plaintiffs argued that the CBA absorption provision granted authority over seniority only, and not over job security.

126. Humphrey v. Moore, 375 U.S. 335, 347 (1964).

127. 776 F.2d 66 (3d Cir. 1985).

drivers' seniority list with that of the Nazareth cement drivers. The Joint Committee, although receiving those documents, heard no argument or evidence either from the Company or the Union on whether they evidenced a contract to not add drivers to the cement seniority list after the door was closed on May 31, 1977.

The district court overturned the award against the grievants and granted eighteen plaintiffs, including the eight grievants, their motion for summary judgment against the Company.[128] Its decision drew upon the 1977 promise as a matter of law that "no additional drivers [would] be added to the cement list"[129] after May 31, 1977. Although the district court refused to instruct the jury that the 1977 agreement was a contract, the plaintiffs were permitted to argue that premise to the jury. The jury found against the plaintiff Company and it appealed the district court's order on its liability.[130]

The appellate court found that the trial court erred both in deciding the Company's liability as a matter of law, and in the manner it sent the plaintiffs' claim against the Union to the jury. The court remanded for a jury trial against both defendants. The centerpiece of its opinion contains three points: (1) although the 1977 notice did manifest a contract, its meaning is for the jury; (2) the Joint Committee's award is final, unless the jury sets it aside as the product of the Union's default in its duty of fair representation; and (3) (implicitly) both defendants enjoy the benefit of the Joint Committee's award unless plaintiffs persuade the jury that it was the product of the Union's breach of its duty of fair representation of the unit consisting of the liquid drivers.[131]

The district court erred in construing the 1977 contract against the Company after rejecting evidence proffered on its meaning[132] and in avoiding the award as an obstacle to plaintiffs' case. The court of appeals stressed the intertwining of the claims against both Company and Union in remanding for jury trial anew.

The significance of the case lies in the court of appeals' view of "permissive" and "mandatory" arbitration. That distinction seems to

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128. The parties agreed to postpone the issue of damages and try liability first.

129. Griesmann v. Chemical Leaman Tank Lines, Inc., 776 F.2d 66, 69 (3d Cir. 1985).

130. The court applied 28 U.S.C. § 1292(b) (1982), granting an interlocutory appeal. *Id.* at 68.

131. The Joint Committee apparently made no findings regarding breach of the Union's duty. *See* Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986) (arbitrator's finding in excess of authority on this issue not binding). The court referred to Vaca v. Sipes, 386 U.S. 171 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), in connection with jury instructions on retrial.

132. Even if the terms of the 1977 Notice were ambiguous, it did not manifest an integrated contract (excluding parol evidence of the meaning of the contract). Griesmann v. Chemical Leaman Tank Lines, Inc., 776 F.2d 66, 72 (3d Cir. 1985).

relate to whether the parties were bound by the CBA to submit the existing dispute to arbitration. The opinion concludes that the submission to the Joint Committee was "mandatory," but would make no difference if it were "permissive." The court's opinion relied on *Teamsters Local 764 v. J.H. Merritt & Co.*[133] and observed that neither the Union nor the Company objected to the Joint Committee's hearing the grievance.[134]

Two seniority lists were involved in the simpler case of *Chicago Web Printing Pressmens Union No. 7 v. Chicago Newspaper Publishers Ass'n.*[135] For thirty years the parties operated under an unwritten seniority system, one list for the day chapel and the other for the night. Transfer from one to the other was possible, but only by resignation from one and starting over as a new hire on the other.

When the Company replaced letter presses with offset presses, extensive training to operate the offset presses became necessary. The parties engaged in negotiations on whether to replace the old seniority system, but the parties concluded a six-year CBA without reference to seniority, like its predecessors. The Company then posted a notice announcing that henceforth seniority would be determined on a company-wide basis. "The parties did not either orally or in writing agree to a formal submission for the arbitrator."[136] The matter was arbitrated on the basis of the Union grievance. It challenged the policy of the notice as violating the long-standing practice, in that it had become part of the CBA.

The Union contended that the only way to alter a past practice was through negotiation. The Company contended that the parties had agreed to alter it and, alternatively, that the Union's agreement was not essential to the change because the conditions on which the two-chapel system was based no longer pertained. The arbitrator denied the grievance finding that the parties had not agreed to eliminate the system and that the past practice was not part of the CBA. Rather, the change in conditions was sufficient to warrant the Company, after negotiations failed, to change the past practice unilaterally.

The award was upheld because the submission included the issue whether the Company had agreed with the Union that the two-chapel system could be terminated only by negotiations. Thus, "the arbitrator was not confined to deciding whether the parties' past practice had been ended by negotiation alone."[137]

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133. 770 F.2d 40 (3d Cir. 1985).

134. Griesmann v. Chemical Leaman Tank Lines, Inc., 776 F.2d 66, 73 (3d Cir. 1985). *Cf. supra* text accompanying note 56.

135. 772 F.2d 384 (7th Cir. 1985).

136. *Id.* at 386.

137. *Id.* at 387. The court addressed the essence test of *Enterprise Wheel* and found it satisfied. Further review of the arbitrator's finding of change in conditions was denied.

Another type of work preservation dispute arises when the employer contracts to have another employer furnish work to complement the primary employer's enterprise. For example, the primary employer may find it expedient to hire another employer for maintenance work within the primary employer's plant. In *Warrior and Gulf*,[138] the Court distinguished between substantive terms concerning "sub-contracting" and the procedural clause of the CBA. The court ordered arbitration of the later-arising dispute, because it related to the substantive terms, and the CBA's (procedural) promises to arbitrate lacked an exception addressed to the grievance.

Although *Warrior and Gulf* resolved the issue whether an existing dispute about sub-contracting was arbitrable under the CBA, in *Enterprise Wheel* the Court decided that the award was final under judicial review, with an exception for remand to the arbitrator to determine back pay. *Enterprise Wheel* differs from *Warrior and Gulf* in that *Warrior and Gulf* did not review an award and *Enterprise Wheel* did not involve a dispute about sub-contracting.

Harley-Davidson Motor Co. v. Allied Industrial Workers Local 209[139] followed *Warrior and Gulf* and *W.R. Grace*. The parties submitted whether the Company violated the CBA "by the actions it took relative to the performance of work in the Parts and Accessories Warehouse on and after January 5, 1982 [and if so] what is the remedy?"[140] The arbitrator heard evidence of a prior award for the Company, but found it distinguishable from the grievance. The prior award, according to the arbitrator, was based on a short-term sub-contract when no employees were on lay-off and "the business was booming."[141] The arbitrator found those circumstances inapplicable to the Company's sub-contracting that prompted the grievance before him.

The arbitrator agreed with the Company that its purpose in sub-contracting was economic, but found that it nevertheless violated the CBA in that the Company discriminated against the Union to achieve that purpose.[142]

In upholding the award, the court held that the conclusiveness of the arbitrator's legal interpretations "should apply to all parties who submit a matter to arbitration... whether the arbitrator's authority stems from the parties' consent, albeit unrequired by the Agreement,

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138. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 574, 582 (1960).
139. 613 F. Supp. 291 (E.D. Wis. 1985).
140. *Id.* at 292.
141. *Id.*
142. The court held that the arbitrator did not disregard the law and properly relied on L.A. Marine Hardware Co., 235 N.L.R.B. 702 (1978), *aff'd sub nom.* Ayers v. Prudential Ins. Co., 602 F.2d 1309 (9th Cir. 1979). (The Board overruled *L.A. Marine* in Milwaukee Spring Div. II, 268 N.L.R.B. 601 (1984)).

or whether it stems from contractual terms to which the parties consented when they entered into the Agreement."[143]

Finch, Pruyn & Co. v. Carpenters Local 229[144] reviewed an award based on a stipulated submission which submitted two issues: "Whether [the Company] violated the 1981-1983 labor agreement . . . by contracting out work while members of the bargaining unit . . . were on layoff; and if so, what shall be the remedy."[145] Over the Company's objection, the arbitrator heard evidence of contracting out in 1983 while millwrights were on layoff. On contracting out in 1982, the arbitrator found no violation because the contracting out was in response to an emergency, but upheld the grievances of the millwrights laid off in 1983. The court denied modification or vacation of the award. Both the grievance and the stipulation specifically covered the 1983 contracting. The case in effect sustains the arbitrator's discretion under the submission to rule on objections to evidence.

Job security cases as presented here do not retreat to the "own-brand-essence" test. Even in *Griesmann*, the Court of Appeals, in moving judicial review from the bench to the jury, gave it to judge the meaning of the contract (rather than, as had the district judge, who ignored it), in the context of the entangled issue of fair representation.[146]

IX. INCOMPLETE AWARDS

Geoffrey Beene, Inc. v. Coat Workers[147] concludes these cases on scope of the arbitrator's authority in disputes on job protection or work preservation and introduces three other cases on incomplete awards. The Union obtained an award based on the Company's violation of a CBA provision requiring the Union's consent to reorganizing the factory. The Company had eliminated its "Beene Bag" line by licensing it to Bobby Brooks, another garment industry employer. The Union's grievance protested the licensing agreement, but on judicial review of the award

143. Harley-Davidson Motor Co. v. Allied Indus. Workers Local 209, 613 F. Supp. 291, 294 (E.D. Wis. 1985). *Cf.* International Chem. Workers Local 526 v. Day & Zimmerman, Inc., 791 F.2d 366 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 274 (1986) (award upheld when parties authorized the arbitrator to frame the submission within his interpretation of the CBA).

144. 109 A.D.2d 991, 486 N.Y.S.2d 472 (3d Dept. 1985).

145. *Id.*

146. Other cases at the margin of job security also test the award as compared to the submission. One concerns reporting pay. Retail, Wholesale & Dept. Store Union v. Decatur & Hopkins Co., 125 L.R.R.M. (BNA) 2959 (D. Mass. 1987). How good was the employees' grievance under a CBA provision for eight hours' pay in lieu of notice not to report for work (at six and seven a.m.) when Governor Dukakis didn't proclaim a state of emergency from hurricane Gloria until 8:30 a.m.? The award sustained the grievance but granted pay for two and a half and one and a half hours only.

147. 562 F. Supp. 1316 (S.D.N.Y. 1983).

the Company denied that it had agreed to submit issues relating to the Bobby Brooks agreement; rather, its agreement to the submission extended only to whether it violated the CBA in Beene Bag's going out of business. The court found that the arbitrator had said it was his practice to decide the stated issues and that the Company did not object further than to admonish the arbitrator not to exceed his powers.

After the award was issued, the arbitrator wrote a supplemental opinion that included this language: "An employer may not unilaterally determine what issues may be arbitrated. To allow this would permit the employer to circumscribe the authority given [the arbitrator] by refusing to submit clearly arbitrable issues of contract interpretation to hearing."[148]

The court sustained the award. The court endorsed the arbitrator's "practice" and formulation of the submission and the above language in his supplemental opinion. The submission as a part of collective bargaining, however, has to be consensual, not a product of the Union's unilateral demands, whether in the grievance or otherwise. If either party refuses to agree to arbitraton of the dispute, the issue belongs to the courts under *AT&T Technologies*, *Warrior and Gulf*, and *American Manufacturing*. The court, in its conclusion that the arbitrator's authority extended to consideration of the Bobby Brooks agreement, appears to have found the Company's equivocal admonition inadequate to exclude that agreement from the issues submitted. If so, endorsing the passage from the arbitrator's opinion does not seem a flagrant contradiction of the doctrine that arbitrability of the dispute belongs to the courts unless the parties incorporate that question in the submission.

The award in *Geoffrey Beene* was incomplete since it contained no remedy, so the court remanded to the arbitrator for determination of appropriate forms of relief.

With respect to the arbitrator's duty to complete the submission by rendering an award that answers all the issues, *Courier-Citizen Co. v. Boston Electrotypers Union 11*[149] offers an intertwining of two awards

148. *Id.* at 1320.

149. 702 F.2d 273 (1st Cir. 1983). The court properly remands for determination of remedy in light of (and merely for the arbitrator's consideration of) the effect, if any, of a successor CBA. International Chem. Workers Local 526 v. Day & Zimmerman, Inc., 791 F.2d 366 (5th Cir.), *cert. denied*, 107 S. Ct. 274 (1986). An award determining the Company's liability under the CBA, but returning the issue of remedy to the parties, reserving authority to resolve their disagreement, exceeded the submission: "[A]nd if so, what remedy?" In Millmen Local 550 v. Wells Exterior Trim, 828 F.2d 1373, 1374 (9th Cir. 1987), the court distinguished *Enterprise Wheel*, in that there the award contained a remedy, and vacated the district court's summary judgment confirming the arbitrator's decision. *Cf.* United Steelworkers v. Aurora Equip. Co., 830 F.2d 753 (7th Cir. 1987) (district court remand to arbitrator is not a final appealable judgment).

by two arbitrators. A job-protection problem arose when the Company installed labor-saving devices, and in May 1975, laid off several members of the bargaining unit (journeymen). The Union represented journeymen but not laborers. When the Company hired G, a laid-off journeyman, to a laborer's job, the Union filed a grievance. The matter came before arbitrator H on this submission:[150] "1. Is the matter arbitrable? 2. Did the Company violate the contract by placing [G] in a laborer's job on June 23, 1975? If so, what shall be the remedy?"[151] H's award of February 12, 1976, sustained the grievance but did not order recall or grant back pay for any specific employee in place of G. Instead, it ordered back pay to "the senior journeyman," to be computed on G's pay minus the senior's earnings from the same period, and the arbitrator "retained jurisdiction" in the event the parties were unable to resolve subsequently-arising questions.[152]

The award took this shape due to the parties' earlier submission to arbitrator S of issues on computing seniority as among the journeymen. S's award had not issued on February 12, the date of H's. On July 26, S awarded primary seniority to K, but the Company rejected the Union's insistence on offering K the laborer's job and granting back pay. The Union then applied to arbitrator H under the award's reservation for disputes subsequently arising under the award. The Company objected to the Union's application and refused to participate in the hearing, but had not earlier objected to the reservation. H nevertheless proceeded *ex parte* with the Union[153] and issued a supplemental award on March 3, 1977 favoring K.

The court affirmed the award as to K, on the basis of a careful examination of doctrines on the duration of authority under an arbitral submission.[154]

In *Brewery and Beverage Drivers Local 67 v. Canada Dry Potomac Corp.*,[155] the Company unilaterally changed the size of cases from two to eight bottles. The bottles held two litres each. The Union's grievance went to arbitration. The arbitrator found the grievance arbitrable, that the employees continued to receive the same rate of commission per case, and that the Company had thereby reduced the rate in violation of a CBA prohibition against reducing pay rates. The award sustained

150. *Id.*

151. *Id.* at 275.

152. *See* Hilton Int'l Co. v. Union de Trabajadores de la Industria Gastronomica Local 610, 600 F. Supp. 1446 (D.P.R. 1985) (approving reservation by arbitrator of authority to hear the parties further in the event of disputes on computing back pay).

153. *Cf.* "Ex Parte Hearings," Opinion No. 13 of the National Academy of Arbitrators Committee on Professional Responsibility and Grievances, June 7, 1986.

154. Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273, 279-80 (1st Cir. 1983). The court vacated the supplemental award as to another journeyman because the original submission did not include a grievance in behalf of that journeyman.

155. 628 F. Supp. 73 (D.D.C. 1986).

the grievance and directed the parties to bargain the increase. (The arbitrator was of the view that his authority did not extend to directing an increase, because to do so would add to the CBA.) The Company sued for modification of the award, without objection to arbitration on the merits. The court granted the Company's motion for summary judgment and remanded for the arbitrator to direct appropriate relief. The opinion relies on *Enterprise Wheel* for its holding on the remedial liscretion of the arbitrator.

IBEW Local 1837 v. Maine Public Service Co.[156] also relates to the duty of the arbitrator to award a remedy. Workers were accustomed to taking breaks for coffee at a restaurant en route to the office in company vehicles. The Company unilaterally put a stop to this practice by requiring that coffee breaks be taken on Company premises. The submission: "Did the Company violate the Collective Bargaining Agreement by implementing a change in the coffee break policy/procedure on or about December 1, 1981? If so, what shall be the remedy?"[157] The arbitrator found the past practice "contractually binding" and ordered the parties to negotiate concerning the change. The parties failed to agree. The court remanded to the arbitrator for formulating a remedy. The court decided that the question about the remedy in the submission did not authorize disregard of the CBA, and hence the submission did not constitute a modification of the CBA.[158]

The "preliminary" award in *Steelworkers v. Ideal Cement Co.*[159] suggested a post-hearing procedure for providing the arbitrator with additional medical information concerning the grievant. Only the Union followed the suggestion but mailed the information *ex parte*. The award was based on wrongful termination of the grievant's employment. In a cover letter for the award the arbitrator explained that he had not read the Union's information. The cover letter offered the Company the choice of accepting the award or voiding it and disqualifying the arbitrator. The Company took the latter option. The arbitrator did not hear further from the Union and set the award aside and disqualified himself. The Union sued to enforce the award or to re-submit the dispute to arbitration. The Company's answer agreed to re-submission and the court ordered it remanded to another arbitrator of the parties' choice. These two awards, the preliminary one and the one under the cover letter offering to set it aside, provided an occasion for judicial review for completeness of awards lacking in finality for failure to resolve the remedy issue.

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156. 579 F. Supp. 744 (D. Me. 1984).

157. *Id.* at 746.

158. On the relationship between CBA and submission, *see supra* text accompanying note 94.

159. 762 F.2d 837 (10th Cir. 1985).

X. CONCLUSIONS

So-called procedural arbitrability has received consistent treatment in the cases under *John Wiley* and *Flair Builders*. The courts consistently distinguish issues arising prior to arbitration as initially arbitrable when they are relevant to an arbitrable dispute. What remains unclear is whether the test is applicable on judicial review. *Misco* was apparently not the "vehicle" for the Court to address the judicial-review test, and its holding generates uncertainty about the application of procedural arbitrability to issues of arbitration hearing procedure. Alternatively, *W.R. Grace* has, for the most part, effectively supplemented *Enterprise Wheel* by influencing courts in review of an award to channel review of a prior award into arbitration.

The cases on submission of arbitrability offer room for advocates and arbitrators to ruminate on whether the submission, if not compelled (as in *Misco*), includes arbitrability for the arbitrator's initial decision. Indeed, the court in *Boston Edison*[160] solved the problem of a submission consisting solely of arbitrability with a novel remedy in addition to those of *AT&T Technologies* and its predecessors (by way of remand for arbitration after vacating the award). The cases on submission of (substantive) arbitrability and on modes of submission stress for the advocates and the arbitrator what is needed for the advocates to police the precision of the submission, lest the award be vulnerable in its incompleteness or excess of authority.

Piggly Wiggly[161] may be the leading case on the parties' discretion in formulating the submission in relation to a prior CBA that provides for arbitration, but other cases, especially on discharge grievances, address that issue. (It did not arise in *Misco*; the Court found no deviation from the CBA in the submission.) The topics on no-strike clause and job security appear to justify the conclusion that the cases in general find the award within the authority granted by the submission. The final topic, on incomplete awards, is essentially procedural and related to the discretion of the trial court.

The spirit of this Article will have been to some extent borne out if it succeeds in laying emphasis on "the other agreement." This emphasis accords a balanced reading of *Enterprise Wheel* as between the "own-brand-essence" test under the CBA, and the lower courts' struggle in reviewing awards based on the submission.

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160. Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 752 F.2d 1 (1st Cir. 1984).

161. Piggly Wiggly Operator's Warehouse, Inc. v. Piggly Wiggly Truck Drivers Local 1, 611 F.2d 580 (5th Cir. 1980).